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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 753

CARL B. GEORGE,

Petitioner,

versus

C. M. LEONARD AND LEONARD CONSTRUCTION COMPANY

REPLY BRIEF OF PETITIONER

Argument

Respondents, in their brief in stating the "question presented", assume that there was a valid compromise by the parties in having the criminal charge against petitioner dismissed. The record does not bear out a valid compromise between the parties.

In effect, respondents were holding petitioner for ransom, through the instrumentality of the law, when he paid the demanded ransom, in order to be free from custody and able to accept a job that was only available for a limited time. (R. 21.) Although respondents were forced to disgorge their illegal exaction of money from petitioner as found by the jury (R. 184), they contend by this payment

shown by the record to have been illegally made petitioner should be barred from obtaining relief against them, and that respondents should benefit by their illegal act to the extent of barring this suit.

The evidence fully substantiated the fact that the respondents instituted the proceedings which resulted in the payment of the money by petitioner. The question of the innocence or the guilt of the petitioner was not left open. He asserted his innocence and protested payment (R. 27, 48, 62, 251). The jury found that the respondents had maliciously abused the process of the law to the extent of $415.00, and the judgment in that companion case has been paid by the respondents. But the very process that was abused is the process which is the subject of this suit, and the very $415.00 claimed by respondents as the compromise settlement is the $415.00 which was illegally exacted and which they have repaid by reason of the verdict of the same jury (R. 186) that decided the instant case. So that factually petitioner was determined to be innocent, and factually it was determined that there was no voluntary agreement of compromise and no settlement.

The Trial judge charged the jury that the plaintiff must show:

> "Third, that the criminal case was not ended by a compromise agreement" (R. 171);

also,

> "if you find from the greater weight of the evidence that the criminal charge was withdrawn pursuant to a voluntary agreement of compromise with the plaintiff, your verdict will be for the defendants" (R. 173);

also,

> "if Carl George in agreeing to the settlement with R. B. Boykin did not admit his guilt, but left the question of

his guilt or innocence open, he could not recover'' (R. 173).

The facts upon which the jury relied in reaching its verdict that the criminal case was not ended by a compromise agreement but was dismissed pursuant to money paid under protest and duress was based upon substantial evidence.

Petitioner testified: ''I found out that if I put in an application for my job and reported to work and got on the payroll by the first of September, I could go back, but after the first of September nobody could go back to Shaw Field unless he was a veteran'' (R. 21).

He further stated (R. 27): ''Boykin (respondents' agent) came in the house with the paper, walked in and he said, 'This is what we figure you owe us'. And, he said, 'If you'll agree to pay us this money, we'll dismiss the warrant and you can go.' And I said, 'Dixie, I don't owe you anything.' I said, 'I'm not going to pay you any money because I'm not accepting any guilt.' He said, 'Well, this is what we figure the amount of turkeys is that's gone, and it's the least figure that we will take to let you go.' And I told him then that he had me where I had to pay it. I had to go to Shaw Field the next morning and Dixie knew it. I told him that if I paid him any money I would certainly pay him under protest. And, he said then that we would go to the Magistrate's office and if I would pay him the money, he would dismiss the warrant.''

Petitioner's father testified (R. 61):

> ''. . . I said, 'Mr. Boykin, you've got me on the spot.' I said, 'You know that boy has got to get to Shaw Field in the morning to get to work or he can't get to work. Now, that boy has got a wife and two children.' . . .
> ''. . . 'Well, Dixie, I'm going to put up that amount of money to get away from here under protest.' He said, 'I don't owe you anything. I haven't taken any turkeys. I'm not accepting any guilt, but I'm going to

put up that amount of money in order to get off.'" (R. 62.)

It will thus be seen that the record shows in order to get to Shaw Field to obtain a job so he could support his wife and two children, petitioner paid this money.

The dissenting opinion of Judge Barksdale (R. 305-306) it is respectfully submitted correctly stating the applicable law and reaches the proper decision in this case.

Petitioner does not, as respondents in their brief apparently assume, ask this Court to reweigh the evidence. The jury weighed it to petitioner's satisfaction, and decided that in *quantum* and credibility it outweighed respondents' evidence. It determined by its verdict (R. 187) under the Court's instructions (R. 164-181) that respondents did not have probable cause to initiate the criminal prosecution, that petitioner was innocent of the charge, that respondents acted maliciously, *that the criminal charge was not withdrawn pursuant to a voluntary agreement of compromise,* and that petitioner did not, by the payment, leave open the question of guilt or innocence.

The District Court submitted the case to the jury under proper instructions as to every element necessary to be proved to recover.

The foundation and gist of an action for malicious prosecution is lack of probable cause. The termination of the criminal prosecution in this case did not destroy that lack of probable cause, and the jury so found.

However, the decision of the Court below rested upon inferences from facts within the exclusive province of the jury, and which could not be drawn by the Court below contrary to the verdict of the jury without erroneously usurping the functions of that fact finding body. *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 75 L. Ed. 544. The decision of the court below was based in part on its

own interpretation of the evidence which was different from the jury's verdict, by which it is bound, and was therefore clearly erroneous as a matter of established law. *Lavender* v. *Kurn*, 327 U. S. 645, 90 L. Ed. 916.

The exception to the general rule relating to termination of criminal prosecution (payment under protest or involuntarily, or without understanding) is well recognized in the South Carolina case of *Jennings* v. *Clearwater Mfg. Co.*, 171 S. C. 498, 172 S. E. 870. (See particularly the long annotation cited therein dealing with this exact question.) But the court below misinterpreted the established law of South Carolina although it cites no South Carolina case that holds that payment *under protest* is an unfavorable termination of a criminal proceeding as to a defendant. The authority is to the contrary, including the cases and authorities cited in the opinion of the court below in its decision of December 8, 1949. (R. 300-305.)

In none of the South Carolina cases cited by respondents in their brief, except *Jennings* v. *Clearwater Mfg. Co.*, 171 S. C. 498, 506, 172 S. E. 870, did the court discuss the questions here involved.

The Supreme Court of South Carolina does not hold that a person situated as petitioner was would be barred from instituting a suit of this character under the circumstances of the dismissal of that suit, as respondents contend, and as the court below held.

In fact the Supreme Court of South Carolina in *Jennings* v. *Clearwater Mfg. Co., supra,* approved the statement in 67 A. L. R. on page 519, that the rule contended for by respondents and followed by the court below

> "is not applied in cases where the settlement was not voluntarily and understandingly made, but was made under coercion or duress; *nor where the dismissal is not shown to have been the result of a valid compromise or settlement.*" (Emphasis supplied.)

In *Baker* v. *Hornick,* 57 S. C. 213, 35 S. E. 524, cited by respondents in their brief, the question of termination of the criminal case was not raised or discussed in the case, except in the most general way as one of the elements of the case.

In *China* v. *S. A. L.,* 107 S. C. 179, 92 S. E. 335, the grand jury had ignored the railroad company's charge of breach of trust, which was held a sufficient termination of the matter to give rise to a suit for malicious prosecution.

In *Stoddard* v. *Roland,* 31 S. C. 342, 9 S. E. 1027, it was held the lower court was right in granting a non-suit for want of probable cause and the question of termination was not decided.

If a payment under protest is not an involuntary payment, then there can be no such thing as an involuntary payment. The Court of Appeals recognized that the petitioner asserted his innocence and protested the payment (R. 301), but held it was of no consequence. Thus the court below disregarded the findings of the jury, acted contrary to and disregarded an established rule of law, and failed to follow the South Carolina rule. The court below held there was a compromise (R. 301), but there was none (R. 61, 62, 270), as this $415.00 was paid under protest in order for respondent to get away to take a job that would only be available the next day. The Court of Appeals held that your petitioner is estopped to bring this action because of the payment of this $415.00 under protest (R. 303-304); yet the jury required respondents to return the money.

In *Morton* v. *Young,* 55 Me. 24, a case of malicious prosecution, it was held:

> "The same legal consequences do not follow acts done under duress of arrest and protest, as when done freely and voluntarily,—under the abuse, as under the legitimate use of legal process. * * * The law does not make successful wrong a shield to protect its perpetrator from liability to afford redress to the injured

party. If the wrongdoer has his hour of triumph, his hour of retribution is sure to come at last. The man who falsely, maliciously, and without probable cause, sues out a process, arrests another, and compels him to pay money to procure his liberty, commits a wrong for which the law affords the sufferer redress in damages. The suing out of legal process is an abuse of the law to cover the fraud, the very wrong which the action of malicious prosecution was instituted to redress. It would be a reproach upon the law, if it should allow the payment of the money, thus wrongfully and illegally extorted from the plaintiff, to have any legal effect against him."

Surely this Court will not permit the extortion of $415.00 under these circumstances to bar this petitioner from recovery when the South Carolina rule, as stated in *Jennings* v. *Clearwater Mfg. Co.*, 171 S. C. 498 (172 S. E. 870), at page 506 is that the rule of Dismissal of Criminal proceedings as result of compromise or settlement as precluding action for malicious prosecution,

> "is not applied in cases where the settlement was not voluntarily and understandingly made, but was made under coercion or duress; nor where the dismissal is not shown to have been the result of a valid compromise or settlement."

Conclusion

WHEREFORE, it is respectfully submitted that the writ of certiorari should issue, as prayed.

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